UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

LOSHAW THERMAL TECHNOLOGY, LLC, Respondent, and INTERNATIONAL ASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL UNION NO. 23, Charging Party.	)	Case Nos. 05-CA-158650

AMICUS BRIEF OF THE ST. LOUIS BUILDING AND CONSTRUCTION TRADES COUNCIL IN SUPPORT OF THE CHARGING PARTY

Comes now the St. Louis Building and Construction Trades Council, pursuant to the Board's September 11, 2018 Notice and Invitation to File Briefs, and submits its amicus brief in support of the Charging Party International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 23. For the following reasons, the St. Louis Building and Construction Trades Council urges the Board to continue to adhere to Staunton Fuel & Material, 335 NLRB 717 (2001) and Casale Industries, 311 NLRB 951 (1993).

I. Identity of the Amicus

The St. Louis Building and Construction Trades Council was formed in 1864. It is comprised of eighteen local unions in the greater St. Louis region that represent workers in the construction industry. The mission of the St. Louis Building and Construction Trades Council is to advocate for construction industry workers. Given this mission, the St. Louis Building and Construction Trades Council has an interest in changes to the law which affect the rights of construction workers.

II. Argument

A. Staunton Fuel

1. Background on Section 8(f) and 9(a) Agreements

Section 8(f) of the Act permits employers and labor organizations in the construction industry to enter into "prehire" collective bargaining agreements without first obtaining majority support of the bargaining unit. Congress permitted 8(f) agreements because of the unique nature of the construction industry. Employment in the construction industry is usually not permanent. Moreover, employers typically obtain their jobs by bidding, which often occurs before they have hired any employees. Finally, construction employers require a steady supply of skilled labor to staff their projects.

Unlike a majority status agreement under Section 9(a), an 8(f) agreement may be terminated by the employer on the expiration of their collective bargaining agreement. John Deklewa & Sons, 282 NLRB 1375, 1386-87 (1987). Under a 9(a) agreement, the employer's duty to bargain continues after the contract expires. Levitz Furniture Co., 333 NLRB 717 (2001). Moreover, an 8(f) contract does not bar the filing of a representation petition while a 9(a) agreement does bar such a petition. Deklewa, 282 NLRB at 1387.

There is a rebuttable presumption that a collective bargaining agreement in the construction industry is an 8(f) agreement. H.Y. Floors & Gameline Painting, 331 NLRB 304 (2000). However, a building trades union may nevertheless obtain 9(a) status through an election or voluntary recognition "based on a clear showing of majority support among the union employees." Deklewa, 282 NLRB at 1387 n.53.

2. Staunton Fuel Decision

In Staunton Fuel, the Board found that a construction employer may voluntarily recognize a union as the 9(a) representative of its workforce through the language of a collective bargaining agreement. 335 NLRB 717 (2001). That language must indicate that the "union requested recognition as majority representative, the employer recognized the union as majority representative, and the employer's recognition was based on the union's having shown, or having offered to show, an evidentiary basis of its majority support." Id. Nevertheless, the Board acknowledged that it would continue to consider "extrinsic evidence bearing on the parties' intent in any case where we find that the contract's language is not independently dispositive." Id. at 722 n.15.

The reasoning behind the Board's decision was to balance "Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry." Id. at 719. In this regard, Staunton Fuel creates a bright line rule which provides certainty to construction industry employers and unions attempting to create 9(a) bargaining relationships and reduces litigation over this issue. Id. at 719.

In Staunton Fuel, the Board adopted the approach of two Tenth Circuit decisions, NLRB v. Triple C Maintenance, Inc., 219 F.3d 1147 (10th Cir. 2000) and NLRB v. Oklahoma Installation Co., 219 F.3d 1160 (10th Cir. 2000). Subsequently, other circuits have also agreed with this approach. See Sheet Metal Workers Local 19 v. Herre Bros., Inc., 201 F.3d 231, 242 (3rd Cir. 1999) (permitting 9(a) status by contract language); Strand Theatre of Shreveport Corp. v. NLRB, 493 F.3d 515, 519 (5th Cir. 2007) (citing Staunton Fuel with approval).

3. Staunton Fuel is Sound Board Policy

Staunton Fuel benefits construction industry unions by creating a roadmap to follow in order to obtain 9(a) status. This promotes stability in collective bargaining relationships. Moreover, it discourages employers from attempting to strategically litigate whether an earlier grant of 9(a) status was proper in an effort to walk away from the collective bargaining relationship.

Staunton Fuel also benefits construction industry employers. By creating a bright line standard for the creation of a 9(a) agreement, it prevents other unions from attempting to organize the bargaining unit (and thus disrupt the terms and conditions of employment) during the term of the agreement. In other words, overturning Staunton Fuel will further encourage "raiding," which already unfortunately occurs in the building trades.

Staunton Fuel also discourages excessive litigation over whether an agreement is governed by Section 9(a) or 8(f). An alternative factor-heavy test would require detailed factual development of each case and could lead to potentially inconsistent results. Finally, building trades unions and employers have relied on Staunton Fuel for seventeen years. It would be unfair to change the rules when countless Staunton Fuel compliant 9(a) agreements are currently in operation.

4. Worker Choice is Protected Under Staunton Fuel

Proponents to overturn Staunton Fuel may claim that creating 9(a) status through contractual language interferes with the free choice of workers. However, workers in the construction industry have other protections against the creation of a 9(a) relationship without their consent. Indeed, in Garner/Morrison, LLC, the Board held that voluntary recognition, even through contract language, may occur only if the employer employed a "substantial and

representative complement" of the workforce to be represented. 353 NLRB 719, 723-24 (2009). Thus, a union could not become the 9(a) representative of a group of painters and tapers through contract language where the employer did not employ any such employees when the agreement was signed. Id. at 724. See also, Elmhurst Care Center, 345 NLRB 1176, 1177 (2005) (involving the same outside the construction industry).

Another protection of worker choice exists in the context of multiemployer associations. If an employer joins a multiemployer association that has previously granted 9(a) status to a union, the union does not automatically become the 9(a) representative of the new association member. Comtel Sys. Tech., Inc., 305 NLRB 287, 291 (1991).

Through Garner/Morrison, LLC, workers are protected from an employer and union creating a sham 9(a) relationship before any workers are hired—even where the 9(a) relationship is allegedly created through contract language. Moreover, Comtel protects against de facto 9(a) status simply when an employer joins a multiemployer association. Given these protections, Staunton Fuel properly balances "Section 9(a)'s emphasis on employee choice with Section 8(f)'s recognition of the practical realities of the construction industry." 335 NLRB at 719.

5. Staunton Fuel is Consistent with Supreme Court Precedent

Nova Plumbing, Inc. v. NLRB, a D.C. Circuit case which rejected Staunton Fuel, relied on the 1961 Supreme Court decision Int'l Ladies' Garment Workers' Union, AFL-CIO v. NLRB to support its holding. 330 F.3d 531, 536 (D.C. Cir. 2003). However, the holding in Nova Plumbing is misplaced because Staunton Fuel is consistent with Supreme Court precedent.

In Garment Workers' Union, the Supreme Court held that it was an unfair labor practice for an employer to grant voluntary recognition to a union where only a minority of the workers supported the union. 366 U.S. 731, 739-40 (1961). However, Garment Workers' Union does not

compel rejection of Staunton Fuel. Indeed, Garment Workers' Union specifically noted that voluntary recognition may be obtained by "cross-checking, for example, well-analyzed employer records with union listings or authorization cards." Id.

Nothing in Staunton Fuel permits a union to obtain 9(a) status without having majority support of the bargaining unit. Instead, it merely permits the parties to memorialize their efforts to determine majority support in the collective bargaining agreement itself. In other words, Staunton Fuel does not undermine Garment Workers' Union and a collective bargaining agreement should continue to operate as a valid basis for voluntary recognition.

B. Casale Industries

In Casale Industries, the Board found that the six month 10(b) limitations period applied to attempts to challenge a construction industry union's 9(a) status. 311 NLRB 951, 953 (1993). In other words, an unfair labor practice or petition for election would be untimely six months after the union was granted 9(a) status. Id. In so holding, the Board reasoned that a similar rules exists with regard to voluntary recognition outside the construction industry and that "unions in the construction industry should not be treated less favorably than those in nonconstruction industries." Id. Moreover, it found that a "contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined." Id.

Casale Industries has been approved by the First, Tenth, and Eleventh Circuits. See NLRB v. Goodless Elec. Co., 124 F.3d 322, 329 (1st Cir. 1997) ("[I]t is clear that when a union claims it has attained majority status and the parties, based on that claim, agree to a Section 9(a) relationship, the employer must challenge that status within a reasonable period of time (six months), or be

bound by its agreement."); NLRB v. Triple C Maint., Inc., 219 F.3d 1147 (10th Cir. 2000); NLRB v. Triple A Fire Protection, 136 F.3d 727, 736-37 (11th Cir. 1998).

The reasoning behind Casale Industries is sound. The overriding purpose of the six month statute of limitations is "to stabilize existing [collective] bargaining relationships" by preventing lawsuits long after an unfair labor practice has occurred. See Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 419 (1960); Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 785 (1996) ("The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes between workers and employees."). Specifically, § 10(b) was enacted "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.'" Local Lodge No. 1424, 362 U.S. at 419 (citation omitted). The Court's decision in Local Lodge No. 1424 and the legislative history it cited require "strict adherence" to the 10(b) limitation. Chambersburg County Market, 293 NLRB 654 (1989).

Continued adherence to Casale Industries makes sense in light of the Board's application of the 10(b) period to the issue of contract repudiation. Indeed, it would be strikingly unfair to entertain a challenge to 9(a) status more than six months after it was granted where a union's claim that the employer repudiated the collective bargaining agreement is barred after six months. A&L Underground, 302 NLRB 467, 468-69 (1991). In A&L Underground, the Board chose to apply the six month limitation period to claims of contract repudiation because otherwise it would leave the "status of the entire agreement and the parties' obligations under it an open question for an extended period." Id. Moreover, the alternative would render the "ability to prepare a defense is increasingly prejudiced as those circumstances become more distant in time and pertinent evidence

grows increasingly stale." Id. This same reasoning equally applies when a union's 9(a) status is challenged six months after it was granted.

Proponents to overturn Casale may argue that limiting challenges to a union's 9(a) status to six months negatively impacts worker choice. To the contrary, workers are still protected from fraud by the collective bargaining parties even under Casale. Indeed, the Board has consistently found that fraudulent concealment of operative facts by a party will toll the 10(b) limitations period. See, e.g., Burgess Construction, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

Overruling Casale Industries would literally permit an employer to challenge a union's 9(a) status years after that employer initially granted it. An employer wishing to rid itself of the union would be given a powerful incentive to challenge the union's 9(a) status at the end of its agreement. Indeed, an employer has no duty to bargain with the union after the expiration of an 8(f) agreement. During the span of time between initial grant and challenge, the authorization cards may have been lost, witnesses may have retired from the union or sought different employment, and memories may have faded. All of these issues put a union at a significant disadvantage to defend against a claim that its 9(a) status was invalid when granted.

III. Conclusion

For the above reasons, Board should to continue to adhere to Staunton Fuel & Material, 335 NLRB 717 (2001) and Casale Industries, 311 NLRB 951 (1993).

Respectfully submitted,

/s/ Michael A. Evans

MICHAEL A. EVANS
HARTNETT GLADNEY HETTERMAN, L.L.C.
4399 Laclede Avenue
St. Louis, MO 63108
Telephone: 314-531-1054
Facsimile: 314-531-1131
mevans@hghllc.net

Attorneys for Amicus St. Louis Building and Construction Trades Council

CERTIFICATE OF SERVICE

This is to certify that service of the above and foregoing AMICUS BRIEF OF THE ST. LOUIS BUILDING AND CONSTRUCTION TRADES COUNCIL IN SUPPORT OF THE CHARGING PARTY has been made on the National Labor Relations Board on October 15, 2018 via the Agency's e-filing portal, and courtesy copies have been electronically served on the following parties, namely:

Andrew Andela
National Labor Relations Board, Region 5
Bank of America Center – Tower II
100 South Charles Street, Suite 600
Baltimore, MD 21201
Andrew.Andela@nlrb.gov
Attorney for General Counsel

Thomas Davies
Harmon & Davies, P.C.
2306 Columbia Avenue
Lancaster, PA 17603-4108
TDavies@h-dlaw.com
Attorney for Respondent

William B. McGee
Business Manager
International Association of Heat and Frost Insulators & Asbestos Workers, Local Union No. 23
3263 Schoolhouse Road
Middletown, PA 17057-3551
bmcgee@insulatorslocal23.com
Charging Party

/s/ Michael A. Evans